

FILED

OCT - 9 2009

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

POSTED ON WEBSITE  
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 09-29162-D-11  
SK FOODS, L.P., ) Docket Control No. MSS-2  
Debtor. )  
\_\_\_\_\_) )  
In re: ) Case No. 09-29161-D-11  
RHM INDUSTRIAL/SPECIALTY FOODS, ) Docket Control No. MSS-2  
INC., )  
Debtor. ) DATE: September 29, 2009  
TIME: 10:00 a.m.  
DEPT: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

I. Introduction

SS Farms, LLC; SSC Farming, LLC; SSC Farming 1, LLC; SSC Farming 2, LLC (collectively the "Farm Entities"); and Scott Salyer ("Salyer") have brought a Motion to Remove Trustee and Disqualify Counsel for Trustee; For Protective Order Striking Complaint and Excluding Evidence Taken in Violation of Moving Parties' Constitutional and Common Law Rights and In Violation of Ethical Standards, Docket Control No. MSS-2 (the "Motion" or "Motion to Remove Trustee").

The Motion is opposed by the chapter 11 trustee in this case, Bradley D. Sharp (the "trustee"), the United States Trustee, and the Official Committee of Unsecured Creditors in

1 this case. In addition, the trustee has brought an Amended  
2 Counter-Motion for an Order Authorizing the Trustee's Continued  
3 Possession of and Review of Information in His Possession and  
4 Which Relates to Non-Debtor Entities (the "Amended Counter-  
5 Motion" or "Counter-Motion"). The Counter-Motion is opposed by  
6 Salyer and the Farm Entities.

7 For the reasons set forth below, the court will deny the  
8 Motion and grant in part the Counter-Motion.

9 II. Background

10 SK Foods, L.P. ("SK Foods"), and RHM Industrial/Specialty  
11 Foods, Inc. ("RHM" and, together with SK Foods, the "debtors")  
12 are processors of tomato products. According to Salyer and the  
13 Farm Entities, Salyer and his related entities, directly or  
14 indirectly, own SK Foods, and the Farm Entities are owned,  
15 directly or indirectly, by Salyer and/or his children.

16 On May 5, 2009, certain creditors filed involuntary chapter  
17 11 petitions against the debtors as Case Nos. 09-28955 and 09-  
18 28956.<sup>1</sup> Two days later, the debtors filed voluntary chapter 11  
19 petitions. On June 18, 2009, the court substantively  
20 consolidated the SK Foods involuntary and voluntary cases and the  
21 RHM involuntary and voluntary cases.

22 The same day the debtors filed their voluntary petitions,  
23 they also filed a motion in each case for the appointment of a  
24 chapter 11 trustee. The motions were granted, and the United  
25 States Trustee's appointment of Mr. Sharp as chapter 11 trustee

---

26  
27 1. Unless otherwise indicated, all Code, chapter, section  
28 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
1330, and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9036.

1 in each case was approved by order dated May 18, 2009. By orders  
2 dated July 15, 2009, the court authorized the trustee to employ  
3 the firm of Schnader Harrison Segal & Lewis, LLP, as his counsel  
4 in each case.

5 Shortly after his appointment, the trustee took possession  
6 of the debtors' books and records and those of related entities,  
7 including Salyer and the Farm Entities, that kept their books and  
8 records on SK Foods' premises and in its computers. The trustee  
9 then filed a motion and an adversary complaint in the SK Foods  
10 case that ultimately triggered the filing by Salyer and the Farm  
11 Entities of the Motion to Remove Trustee. First, on June 9,  
12 2009, the trustee filed a motion for an order determining that  
13 certain wastewater discharge agreements between one or the other  
14 of the debtors, on the one hand, and one or another of the Farm  
15 Entities, on the other hand, were executory as of the  
16 commencement of the cases, and therefore, subject to assumption  
17 or rejection by the trustee (the "Wastewater Motion").<sup>2</sup> On June  
18 12, 2009, the trustee filed an adversary complaint seeking to  
19 substantively consolidate a large number of entities allegedly  
20 owned and controlled by Salyer, including the Farm Entities, and  
21 the assets of those entities into the debtors' bankruptcy estates  
22 ("the Adversary Complaint").<sup>3</sup>

23 / / /

24 \_\_\_\_\_  
25 2. Chapter 11 Trustee's Motion for Order Determining that  
26 Wastewater Discharge Agreements with Related Parties Constitute  
"Executory Contracts" for Purposes of 11 U.S.C. §365, filed June  
9, 2009.

27 3. Adversary Complaint for (1) Substantive Consolidation  
28 (2) Declaratory Relief (3) Recovery of Fraudulent Transfers,  
filed June 12, 2009, and assigned Adv. No. 09-2342.

1 On August 7, 2009, Salyer and the Farm Entities filed the  
2 Motion to Remove Trustee. They allege that Salyer's and the Farm  
3 Entities' files and records are confidential vis-à-vis the  
4 trustee and in many instances protected by the attorney-client  
5 privilege or the work product doctrine. They allege further that  
6 the trustee's and his counsel's actions with respect to the files  
7 and records of Salyer and the Farm Entities violated and continue  
8 to violate their privacy rights under the California Constitution  
9 and the Fourth Amendment to the United States Constitution and,  
10 as to the trustee's counsel, the California Rules of Professional  
11 Conduct, and constitute conversion. Accordingly, Salyer and the  
12 Farm Entities ask the court to remove the trustee, disqualify his  
13 counsel, dismiss the Adversary Complaint, exclude from evidence  
14 documents the trustee allegedly unlawfully obtained, and require  
15 the trustee and his counsel to account for every record they  
16 accessed.

17 On September 1, 2009, the trustee filed the Amended Counter-  
18 Motion, in which he alleges that Salyer and the Farm Entities'  
19 actions are inconsistent with the maintenance of a privacy  
20 interest or privilege in their records vis-à-vis the debtors and  
21 the trustee. The trustee therefore requests an order confirming  
22 his authority to possess and control the records in question.

23 The court has reviewed the parties' respective memoranda of  
24 points and authorities, oppositions, supporting declarations,  
25 exhibits, and replies, with regard to both the Motion and the  
26 Counter-Motion. The court heard oral argument on September 29,  
27 2009.

28 / / /

1 Preliminarily, the court has considered Salyer and the Farm  
2 Entities' separate statements of material disputed facts, filed  
3 in connection with both the Motion and the Counter-Motion, and  
4 their objections to the admission of certain evidence. The court  
5 has not found it necessary for purposes of this decision to  
6 determine any of the allegedly disputed facts or to rely on any  
7 of the challenged evidence. Thus, an evidentiary hearing is not  
8 necessary. For purposes of this decision, and on the basis that  
9 it is not necessary that the court rely on the challenged  
10 evidence, the court sustains the objections to evidence.

### 11 III. Analysis

12 This court has jurisdiction over the Motion pursuant to 28  
13 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding  
14 under 28 U.S.C. § 157(b)(2)(A).

#### 15 A. Standards for Removing a Trustee

16 "The court, after notice and a hearing, may remove a trustee  
17 . . . for cause." § 324(a). The Bankruptcy Code does not define  
18 "cause," but it is "well-established that 'cause' may include  
19 trustee incompetence, violation of the trustee's fiduciary  
20 duties, misconduct or failure to perform the trustee's duties, or  
21 lack of disinterestedness or holding an interest adverse to the  
22 estate." In re AFI Holding, Inc., 355 B.R. 139, 148 (9th Cir.  
23 BAP 2006), aff'd and adopted, 530 F.3d 832 (9th Cir. 2008). A  
24 party seeking removal must set forth and prove specific facts  
25 supporting cause. Id.

26 A trustee is the legal representative and fiduciary of the  
27 bankruptcy estate. Id. at 147. His or her primary role is to  
28 marshal and sell assets so that their value may be distributed to

1 creditors. Id. at 148. To that end, a trustee has an  
2 affirmative duty to investigate the debtor's financial affairs.  
3 11 U.S.C. §§ 704(4), 1106(a)(3). The trustee at all times must  
4 act without regard to his own interests or those of any  
5 particular creditor, AFI Holding, 355 B.R. at 147, 148, and must  
6 act with "that measure of care and diligence that an ordinary  
7 prudent person would exercise under similar circumstances." In  
8 re Rigden, 795 F.2d 727, 730 (9th Cir. 1986).

9 The Farm Entities do not allege that the trustee violated  
10 his fiduciary duties.<sup>4</sup> Their claim for removal is instead  
11 predicated on his alleged misconduct with respect to their  
12 personal and business records, which they allege violated their  
13 state constitutional right of privacy (Article I, section 1 of  
14 the California Constitution), their rights under the Fourth  
15 Amendment to the United States Constitution, and their rights  
16 under the attorney-client privilege and the attorney work product  
17 doctrine.

18 B. Standards for Evaluating Privacy, Privilege, Conversion Claims

19 The elements of a claim for violation of the California  
20 constitutional right of privacy are "(1) a legally protected  
21 privacy interest; (2) a reasonable expectation of privacy in the  
22 circumstances; and (3) conduct by defendant constituting a  
23 serious invasion of privacy." Hill v. National Collegiate  
24 Athletic Assn., 7 Cal. 4th 1, 39-40 (1994). The first element is  
25 a question of law; the latter two, mixed questions of law and  
26 fact. Id. at 40. "If the undisputed material facts show no  
27

---

28 4. For ease of reference, this and subsequent references to  
the Farm Entities will, unless otherwise noted, include Salyer.

1 reasonable expectation of privacy or an insubstantial impact on  
2 privacy interests, the question of invasion [of the right of  
3 privacy] may be adjudicated as a matter of law." Id.

4 Similarly, "the Fourth Amendment does not proscribe all  
5 searches and seizures, but only those that are unreasonable."  
6 Skinner v. Railway Executives' Ass'n., 489 U.S. 602, 619 (1989).  
7 "What is reasonable, of course, 'depends on all of the  
8 circumstances surrounding the search or seizure and the nature of  
9 the search or seizure itself.'" Id., quoting United States v.  
10 Montoya de Hernandez, 473 U.S. 531, 537 (1985).

11 The party charging a violation of the Fourth Amendment "must  
12 show that he had a reasonable expectation of privacy in the place  
13 searched." United States v. Heckenkamp, 482 F.3d 1142, 1146  
14 (2007), citing Rakas v. Illinois, 439 U.S. 128, 143 (1978). "An  
15 individual has a reasonable expectation of privacy if he can  
16 'demonstrate a subjective expectation that his activities would  
17 be private, and he [can] show that his expectation was one that  
18 society is prepared to recognize as reasonable.'" Heckenkamp, 482  
19 F.3d at 1146, citing United States v. Bautista, 362 F.3d 584, 589  
20 (9th Cir. 2004).

21 Among the factors the court may consider are

22 the [individual's] possessory interest in the property  
23 searched or seized, see United States v. Broadhurst,  
24 805 F.2d 849, 852 n.2 (9th Cir. 1986), the measures  
25 taken by the defendant to insure privacy, see id.,  
26 whether the materials are in a container labeled as  
27 being private, see id., and the presence or absence of  
28 a right to exclude others from access, see Bautista,  
362 F.3d at 589.

Heckenkamp, 482 F.3d at 1146.

/ / /

1 The right of privacy, under both the California Constitution  
2 and the Fourth Amendment, may be waived by consent. Hill, 7 Cal.  
3 4th at 26 (California Constitution); Schneckloth v. Bustamonte,  
4 412 U.S. 218, 222 (1973) (Fourth Amendment).

5 The attorney-client privilege may be waived by voluntary  
6 disclosure, United States v. Plache, 913 F.2d 1375, 1379 (9th  
7 Cir. 1990), citing Clady v. County of Los Angeles, 770 F.2d 1421,  
8 1433 (9th Cir. 1985). The party asserting the privilege must  
9 prove he or she has not waived it. Weil v. Investment/  
10 Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir.  
11 1981). Id. "Because it impedes full and free discovery of the  
12 truth, the attorney-client privilege is strictly construed."  
13 Id. at 24.

14 Waiver of the privilege may be express or implied. In re  
15 Oracle Securities Litigation, 2005 U.S. Dist. LEXIS 46931, \*21  
16 (N.D. Cal. 2005). "An express waiver occurs when a party  
17 discloses privileged information to a third party who is not  
18 bound by the privilege, or otherwise shows disregard for the  
19 privilege by making the information public." Id.<sup>5</sup>

20 An 'express' waiver need not be effectuated by words or  
21 accompanied by the litigant's subjective intent.  
22 [Citation] Rather, the privilege may be waived by the  
client's . . . actions, even if the disclosure that  
gave rise to the waiver was inadvertent.

23 Bittaker, 331 F.3d at 720, n.4. Like the attorney-client  
24 privilege, the protection of the attorney work product rule may  
25

26 5. By contrast, "[a]n implied waiver arises where a party  
27 asserts a claim that places at issue privileged matter" (id. at  
719), such as where a client puts his or her attorney's  
28 performance at issue during the course of litigation. See  
Bittaker v. Woodford, 331 F.3d 715, 719-20 (9th Cir. 2003).



1 be waived. Oracle at \*18, citing United States v. Salsedo, 607  
2 F.2d 318, 320 (9th Cir. 1979).

3 Finally, the court looks to state law to determine whether a  
4 conversion has occurred. Petralia v. Jercich (In re Jercich),  
5 238 F.3d 1202, 1206 n.16 (9th Cir. 2001), citing In re Bailey,  
6 197 F.3d 997, 1000 (9th Cir. 1999). The elements of a conversion  
7 in California are (1) the plaintiff's ownership or right to  
8 possession of property; (2) the defendant's conversion by a  
9 wrongful act or disposition of property rights; and (3) damages.  
10 Farmers Ins. Exchange v. Zerin, 53 Cal. App. 4th 445, 451 (1997).

11 However, "a plaintiff in a conversion action must also prove  
12 that it did not consent to the defendant's exercise of dominion."  
13 Bank of New York v. Fremont General Corp., 523 F.3d 902, 914 (9th  
14 Cir. 2008), citing Farrington v. A. Teichert & Son, Inc., 59 Cal.  
15 App. 2d 468, 474 (1943) ["there can be no conversion where an  
16 owner either expressly or impliedly assents to or ratifies the  
17 taking, use or disposition of his property."].

#### 18 C. Discussion

19 The Farm Entities rely primarily on In re Truck-A-Way, 300  
20 B.R. 31 (E.D. Cal. 2003), in which an attorney for a chapter 7  
21 trustee obtained an ex parte order purportedly authorizing him to  
22 enter and search certain residences located outside the district  
23 and to seize items that were property of the estate. The  
24 attorney used intimidation by way of the presence of armed deputy  
25 U.S. Marshals to gain entrance to a private residence over the  
26 objection of its occupants, a mother with her two small children.  
27 The resulting search encompassed a bedroom and included dressers  
28 and other personal belongings. The attorney seized the titles to

1 two vehicles and a key for a storage locker, from which he seized  
2 boxes of documents. The court, noting that the attorney's  
3 actions were "unlike anything to come before this court," 300  
4 B.R. at 35, disqualified counsel. Id. at 40.

5 The Truck-A-Way case is inapposite here. Indeed, its facts  
6 are so glaringly different from those in the case at hand that  
7 the Farm Entities' need to rely on it undercuts their argument.

8 No one is alleged to have forcibly entered a private  
9 residence or any other premises to which the trustee did not  
10 lawfully have access. Instead, pursuant to his duty to  
11 investigate the debtors' affairs, see § 1106(a)(3), the trustee  
12 took control over the debtors' business records at SK Foods'  
13 business premises and on SK Foods' computers.<sup>6</sup>

14  
15 6. The Farm Entities' heavy reliance on United States v.  
16 Comprehensive Drug Testing, Inc., 2009 U.S. App. LEXIS 19119 (9th  
17 Cir. 2009), is similarly flawed. That case concerned the  
18 government's execution of a warrant for electronic records of  
19 steroid drug testing on professional baseball players, and its  
20 seizure of records of persons, baseball players and others, other  
21 than those named in the warrant. That case lacked the element of  
22 ownership and control, present in this case, between those named  
in the warrant and the third parties whose records were also  
searched. Further, the case did not implicate bankruptcy  
considerations in any way, or a trustee's duties under the Code,  
and the search and seizure took place at premises at which the  
government agents otherwise had no right to access. Finally, the  
question of waiver, as discussed below, was not in play in  
Comprehensive Drug Testing.

23 The bankruptcy cases cited by the Farm Entities, In re White  
24 House Decorating Co., 607 F.2d 907 (10th Cir. 1979); In re  
Skinner, 336 B.R. 316 (Bankr. N.D. Ohio 2005); United States v.  
25 Patrick, 916 F. Supp. 567 (N.D. W.Va. 1996); and In re Asia  
Global Crossing, Ltd. 322 B.R. 247 (Bankr. S.D.N.Y. 2005), either  
26 do not stand for the propositions for which they are cited (White  
House Decorating) or are inapposite (Skinner - whether a trustee  
27 may search a non-debtor's residence; Patrick - whether a trustee  
may consent to government's search in criminal case of non-debtor  
premises; Asia Global Crossing - whether waiver occurred by

(continued...)

1 1. Storage of and Access to Paper and Electronic Records

2 As it happened, most of the Farm Entities' paper records,  
3 including financial, legal, and business records, were located at  
4 SK Foods' places of business or in storage units under SK Foods'  
5 control. Declaration of Shondale Seymour in Support of  
6 Opposition to the Motion to Remove Trustee, filed August 19, 2009  
7 ("Seymour Decl."), ¶¶4, 8, 9.

8 Similarly, the debtors' and the Farm Entities' electronic  
9 records were stored on computer systems at SK Foods' premises --  
10 before June 2008, on an AAS Enterprise system or in Lotus or  
11 Excel workbooks owned and maintained by the debtors, Seymour  
12 Decl. ¶15, and after June 2008, on Microsoft Dynamics Axapta  
13 ("DAX") software. Id. at ¶16. Both the e-mail system and the  
14 DAX systems servers were used collectively by SK Foods and the  
15 Farm Entities. Declaration of John Matthew Gallegly in Support  
16 of Opposition to the Amended Counter-Motion ("Gallegly Decl.")  
17 ¶¶6, 7. Although access to records stored on these servers was  
18 restricted, id. at ¶¶9,10, Dan Kline, SK Foods' Vice President of  
19 Information Technology, and his staff had access to all these  
20 records. Kline Declaration in Support of Opposition to Motion to  
21 Remove Trustee, filed August 19, 2009, ¶8.<sup>7</sup>

22 In short, virtually all electronic documents relating to the  
23 debtors and the other Salyer entities, including the Farm  
24 Entities, were stored on computer systems maintained by SK Foods,

---

25  
26 6. (...continued)  
virtue of corporate e-mail policy).

27 7. "My staff and I had access to everything on the network,  
28 24/7, 365 days a year to keep the network up and managed, and my  
responsibilities required me the access to review, organize and  
analyze files of the Salyer-Related Entities and Affiliates on a  
regular basis." Id.

1 and the e-mail communications of all the companies were stored on  
2 a server maintained by SK Foods. Seymour Decl. §§17, 18.<sup>8</sup>

3 Shondale Seymour was the Chief Financial Officer of the  
4 debtors, and between June 2008 and April 10, 2009, was also the  
5 CFO of the Farm Entities. As such, she was "involved in  
6 financial management, financial planning, and record keeping."  
7 Seymour Decl. ¶1. With limited exception, all administrative and  
8 operations support for the Farm Entities, including human  
9 resources, administration, IT functions, and accounting, was  
10 provided by SK Foods, through its resources and staff. Id. ¶8.

11 Indeed, the Farm Entities concede that they "stored and  
12 regularly accessed their financial, business, estate planning and  
13 other personal documents at SK Foods, LP[,] and that SK Foods'  
14 personnel "performed accounting and record keeping services for  
15 the Farm Entities," albeit with an allocation of expenses.  
16 Points and Authorities in Support of Motion to Remove Trustee,  
17 filed August 7, 2009 ("P. & A."), at 4.

18 The Farm Entities nevertheless insist that SK Foods'  
19 employees knew the parties intended "to maintain a separateness  
20 and privacy interest in the operating and stored records and  
21 data; [and] that the information was confidential[.]" Id. at 5.  
22 To support this conclusion, the Farm Entities rely on the  
23 testimony of John Matthew Gallegly, Information Technology  
24 Consultant to Salyer American Fresh Foods and an employee of SK  
25 Foods (and Scott Salyer's son-in-law), that internal security

---

26  
27 8. For purposes of this decision, the court finds it  
28 irrelevant which entities paid for, owned, or leased which  
systems.

1 procedures limited access to the records stored on the DAX  
2 systems to particular users. Gallegly Decl. ¶¶8-12.

3 However, more important is this testimony of Ms. Seymour,  
4 not countered by the Farm Entities, which clearly shows that even  
5 though there may have been certain limited restrictions, the  
6 information was accessible by a number of people:

7 At all times during my tenure with the Debtors and any  
8 and all of the Salyer-Related Entities and Affiliates,  
9 SK Foods' possession of, access to and review of the  
10 business records of these other entities was  
11 specifically approved by Scott Salyer or his designee  
12 on behalf of the Salyer-Related Entities and  
13 Affiliates. Scott Salyer and Mark McCormick . . .  
14 authorized and instructed me and/or my staff to perform  
15 specific functions on behalf of these other entities on  
16 a regular basis. These functions included, for  
17 example, the transfer of funds from one entity to  
18 another. These tasks (in addition to the general  
19 responsibilities of handling all accounting) required  
20 my staff and me to access, review and often make  
21 entries into the business records of these other  
22 entities. We did this in the daily course of our  
23 responsibilities and at the direction of the most  
24 senior management, and have been, at all times,  
25 authorized to do so. . . . At no time during my tenure  
26 for the Debtors or for the Salyer-Related Entities or  
27 Affiliates was I ever advised that I was not to access  
28 or review business records of the other Salyer-Related  
Entities or Affiliates. To the contrary, I was given  
responsibilities that required me to access, review and  
analyze those records on a regular basis.

Seymour Decl. ¶¶12, 14.

21 The court concludes that with the knowledge and acquiescence  
22 of the management of the Farm Entities, and indeed with the  
23 permission and at the direction of Scott Salyer, the personal,  
24 legal, business, and financial records, both paper and  
25 electronic, of Salyer and the Farm Entities were stored at the  
26 premises of SK Foods, in storage units maintained by SK Foods, or  
27  
28

1 on computers at the premises of and maintained by SK Foods.<sup>9</sup> The  
 2 court also concludes that with that same knowledge, acquiescence,  
 3 permission, and direction, these records were routinely accessed  
 4 and reviewed by employees of SK Foods.

5 2. The Justice Department Raid and the Retention of Counsel

6 The court need not determine whether, as of April 2008, the  
 7 Farm Entities had a reasonable expectation of privacy concerning  
 8 their records stored at SK Foods' premises and on computers on  
 9 those premises. At that time, representatives of "the Anti-Trust  
 10 Division of the [U.S.] Department of Justice and other federal  
 11 agents," with search warrants, raided the premises of SK Foods  
 12 and seized "an enormous volume of records and copied many other  
 13 documents and computers . . . ." P. & A. at 5 n.3.

14 [M]any of the employees were thereafter represented by  
 15 counsel; counsel for SK Foods LP had been active at the  
 16 corporate headquarters and at the facilities; [and]  
 employees of the company had publically plead guilty to  
 federal offenses as had employees of customers, . . . .

17 Id.<sup>10</sup> The raid must have necessarily put on everyone's radar  
 18 screen the risk of storing Salyer and the Farm Entities'  
 19 documents and information on SK Foods' premises and computers and  
 20 the consequences of leaving possession in the hands of SK Foods.<sup>11</sup>

---

22 9. The court finds it unnecessary for purposes of this  
 23 decision to determine whether the records of Salyer and the Farm  
 24 Entities were maintained in locations within the SK Foods  
 premises or on its computers that were separate and apart from  
 the records of the debtors.

25 10. The logical inference is that Salyer personally  
 26 employed counsel, as he was, directly or indirectly, the owner of  
 27 the various companies, and as such, one of the primary targets,  
 if not the primary target, of the investigation.

28 11. The court does not mean to suggest that SK Foods is or  
 (continued...)

1 The court cannot conjure a bigger red flag.

2 The raid was followed by a federal grand jury investigation  
3 and criminal informations in which certain parties were charged  
4 with mail fraud, wire fraud, bribery, and false and misleading  
5 labeling of products. The defendants have included certain  
6 current and former employees of SK Foods. There have also been a  
7 number of class action and other lawsuits filed against SK Foods  
8 and others. See Declaration of Lisa Crist in Support of Chapter  
9 11 Petitions and First Day Pleadings, filed May 8, 2009, at 10-  
10 11. The court makes no findings as to the level of involvement  
11 of the Farm Entities in those proceedings; however, any  
12 suggestion that Salyer, in his capacity as an individual and on  
13 behalf of the Farm Entities, or others in charge of the Farm  
14 Entities were not fully aware of what was going on would not be  
15 credible. Indeed, there is no such contention.

16 To put it generously, the Farm Entities skirt the issue as  
17 to why, with knowledge of the risk attendant to leaving the  
18 records at SK's premises, they did not simply remove them before  
19 the chapter 11s were filed. Instead, they devote their attention  
20 to their post-petition demands that the trustee cease his review  
21 of their records and return the records to them, and the  
22 trustee's refusal to do so. However, by the time the trustee was  
23

---

24 11. (...continued)  
25 is not a "third party" vis-à-vis the Farm Entities. The court  
26 has no need at this time to determine whether either or both  
27 debtors are third parties, or are one and the same as one or more  
28 of the Farm Entities for purposes of substantive consolidation or  
for any other reason. The Farm Entities contend that the  
trustee's position as regards the documents and records is based  
on such an identity. The court bases the present decision on  
other grounds.



1 appointed, the Farm Entities no longer could have had any  
2 reasonable expectation of privacy as regards their records stored  
3 at SK Foods and on its computers, and to whatever extent they  
4 previously had such an expectation, they clearly waived it when,  
5 over the course of a full year, they failed to take any steps  
6 whatsoever to remove their documents from the possession and  
7 control of SK Foods and failed to instruct employees of SK Foods,  
8 including Shondale Seymour and Lisa Crist, to cease their review  
9 of such records. Seymour Decl. at ¶¶ 12, 14; Declaration of Lisa  
10 Crist in Support of Response to the Motion to Remove Trustee,  
11 filed August 19, 2009, at ¶¶ 13, 14.

12 Viewed in this light, the Farm Entities' contention that  
13 they had no time to remove their records from the debtors'  
14 possession because the bankruptcies were "abruptly initiated  
15 involuntarily" by their lenders defies credibility.<sup>12</sup> The Justice  
16 Department raids preceded the filing of the involuntary petitions  
17 by over a year. The debtors retained the national law firm of  
18 Winston & Strawn LLP in February 2009, three months prior to the  
19 filings, to assist with preparation of the filings and sale of  
20 the debtors' assets, and to assist in responding to the federal  
21 criminal investigation. Seymour Decl. at ¶29. By the time of  
22 the filings, Winston had "accumulated extensive knowledge of the  
23 [d]ebtors' business and engaged in negotiations with parties in  
24 interest" to such an extent that it had accrued fees and costs  
25 totaling \$1,436,500. Declaration of Richard A. Lapping in  
26 Support of Application for Authority to Employ Winston & Strawn

---

27  
28 12. Reply in Support of Motion to Remove Trustee, filed  
September 22, 2009 (the "Reply"), at 5 n.3.



1 LLP as Special Counsel to Chapter 11 Trustee, filed June 2, 2009,  
2 at ¶¶3(a), 5.

3 Finally, on April 10, 2009, almost a month prior to the  
4 filings, Salyer and certain of his entities retained the national  
5 law firm of Kasowitz, Benson, Torres & Friedman LLP. Seymour  
6 Decl. at ¶31. Attorneys at Kasowitz "had a great deal of  
7 interaction" with Richard Lapping, of Winston & Strawn, prior to  
8 the chapter 11 filings. Supplementary Declaration of Donald J.  
9 Putterman in Support of Reply in Support of Motion to Remove  
10 Trustee, filed September 22, 2009, at ¶22.

11 On April 16, 2009, Donald J. Putterman, of the Kasowitz  
12 firm, sent a letter to the managing director of one of the  
13 debtors' lenders referencing the lenders' threat to file  
14 involuntary bankruptcy proceedings. Affidavit of Lawrence  
15 Mizera, filed under seal on August 20, 2009, Ex. A. The next  
16 day, an attorney for that lender responded to Mr. Putterman,  
17 stating:

18 As you know, the Lenders are owed in excess of \$190  
19 million, certain proceeds of which, on information and  
20 belief, have been drained from the Borrowers [the  
debtors] to affiliated non-borrowers and for the  
personal benefit of related parties.

21 Affidavit of James Spiotto, filed under seal on August 20, 2009,  
22 Ex. A.

23 Thus, at least as early as April 17, 2009, Salyer's personal  
24 counsel was clearly on notice of the potential of involuntary  
25 bankruptcy proceedings and of the suspicion on the part of the  
26 debtors' major lenders that improper insider transfers had taken  
27 place.

28 / / /

1 It is clear Salyer had sophisticated legal advice, knew of  
2 the contemplated chapter 11 filings, and knew the major lenders  
3 were suspicious of improper insider dealings. At some point, he  
4 authorized the voluntary filings, then requested a chapter 11  
5 trustee be appointed, and knew or certainly should have known a  
6 chapter 11 trustee is mandated to investigate the debtor's books  
7 and records, financial affairs, assets, liabilities, and dealings  
8 with others, especially insiders.<sup>13</sup> In circumstances where the  
9 debtors' major lenders had already raised the prospect of  
10 inappropriate transfers, Salyer must have known a trustee's  
11 attention would be drawn to the records of all the related  
12 entities, not just those of the debtors.

13 In truth, the Farm Entities had endless opportunities to  
14 segregate and remove their records from the debtors' records  
15 before the debtors filed their voluntary petitions, but chose not  
16 to. By the Farm Entities' own account, to do so would have been  
17 easy since their files were separately labeled. P. & A. at 12.  
18 Under all these circumstances, the trustee's taking control of  
19 all records located at the debtors' premises and on the debtors'

20  
21  
22  
23 13. Not only did Salyer and his counsel contemplate the  
24 appointment of a chapter 11 trustee from the very beginning of  
25 these cases, they also had in mind the particular individual who  
26 was ultimately appointed. In their motion, the debtors were  
27 complimentary of Mr. Sharp's background, experience, and  
28 effectiveness as a chapter 11 trustee, and expressly requested  
that the Office of the United States Trustee consider appointing  
him. The Bank of Montreal indicates in its joinder in the motion  
to appoint a chapter 11 trustee, filed May 11, 2009, that Mr.  
Sharp "[had] already begun to familiarize himself with the  
operations of the [d]ebtors . . . ." Salyer was clearly part of  
a very small group that hand-picked Mr. Sharp for this role.

1 electronic systems was not only foreseeable but to be expected.<sup>14</sup>

2 The Farm Entities attempt to put the onus on the trustee,  
3 charging him with searching through the documents to segregate  
4 and return those allegedly not belonging to the debtors, without  
5 himself reviewing their contents, or alternatively, with seeking  
6 instruction from the court as to how to perform his statutory  
7 duties. Under the circumstances presented here, the court would  
8 not put the trustee in such an untenable position.

9 Also unavailing is the Farm Entities' argument that portions  
10 of the documents in question have nothing to do with the  
11 Wastewater Motion or the allegations in the Adversary Complaint.  
12 The scope of a trustee's duties and of his legitimate access to  
13 books and records is, of course, never limited by the subject  
14 matter of motions and adversary complaints already on file.  
15 Finally, the court rejects the Farm Entities' contention that the  
16 trustee should be precluded from using the documents or their  
17 contents against the Farm Entities.

18 In short, represented by counsel, the Farm Entities chose  
19 not to act. In effect, the Farm Entities ask the court to shield  
20 them from the direct and clearly foreseeable consequences of  
21 their own ill thought-out and imprudent choices. This the court

---

22  
23 14. "The absence of a right to exclude others from access  
24 to a situs is an important factor militating against a legitimate  
25 expectation of privacy." Bautista, 362 F.3d at 589, citing  
Rawlings v. Kentucky, 448 U.S. 98, 105 (1980). Thus, where a  
hotel guest's stay has run, he or she no longer has a legitimate  
expectation of privacy in the hotel room. Bautista at 589.

26 Similarly, in this case, Salyer gave up the right of access  
27 to SK Foods' premises, including computers on those premises,  
28 when he authorized the debtors to request the appointment of a  
chapter 11 trustee. With the right of access, he also gave up  
any reasonable expectation of privacy.

1 will not do.

2 IV. Conclusion

3 Whether a party has a reasonable expectation of privacy is a  
4 context-specific inquiry. Leonel v. Am. Airlines, 400 F.3d 702,  
5 712 (9th Cir. 2005). The question of consent is similarly to be  
6 determined based on the totality of the circumstances. Hill,  
7 7 Cal. 4th at 102 n.15. Based on the facts of this case, the  
8 court finds that the Farm Entities had no reasonable expectation  
9 of privacy in records stored at the debtors' place of business,  
10 in their storage units, or on their electronic systems; or, in  
11 the alternative, that the Farm Entities have waived their  
12 reasonable privacy expectation in these records by not removing  
13 them before the bankruptcy filings. The court thus concludes  
14 that the trustee did not run afoul of the Fourth Amendment.<sup>15</sup>

15 For the same reason, the court also finds that the Farm  
16 Entities, as against the debtors and the trustee, waived their  
17 right of privacy in the records at issue, and that the trustee  
18 did not convert the Farm Entities' records. See Kremen v. Cohen,  
19 337 F.3d 1024, 1030 (9th Cir. 2003) (putative owner in conversion  
20 action must have established a legitimate claim to exclusivity).

21 Finally, based on the Farm Entities' conduct and the  
22 analysis set forth above, the court finds that the Farm Entities  
23 waived the attorney-client privilege and their rights under the  
24

---

25 15. Because the court finds the Farm Entities had no  
26 reasonable expectation of privacy, it need not decide whether the  
27 Fourth Amendment binds a bankruptcy trustee. The court notes  
28 that the cases are divided on this question. Cf. Truck-A-Way,  
300 B.R. at 36-37 (trustee is so bound); In re Barman, 252 B.R.  
403, 412-413 (Bankr. E.D. Mich. 2000) (same); In re Kerlo, 311  
B.R. 256 (Bankr. C.D. Cal. 2004) (trustee is not so bound).

1 work-product doctrine in the records at issue.<sup>16</sup>

2 Because the court is persuaded that the Trustee and his  
3 counsel did not act improperly, it will deny the Farm Entities'  
4 request to disqualify either. The court will also deny the Farm  
5 Entities' requests to dismiss the Adversary Complaint, to exclude  
6 evidence obtained as a result of the trustee and his counsel's  
7 review of their records, and to require the trustee to account  
8 for the records he accessed. The court will grant the Counter-  
9 Motion, but only with respect to Salyer and the Farm Entities'  
10 records, since only Salyer and the Farm Entities have had the  
11 opportunity to oppose the Counter-Motion.

12 The court will issue an appropriate order.

13 Dated: October 9, 2009

Robert S. Bardwil  
14 ROBERT S. BARDWIL  
15 United States Bankruptcy Judge  
16  
17  
18  
19  
20

21 16. The Farm Entities express concern about the costs  
22 presumably imposed by a rule whereby "separate businesses who  
23 share administrative functions waive all property rights and  
24 privileges" when one such business files for bankruptcy. Reply  
at 15. The better rule, according to the Farm Entities, is that  
such shared functions (and concomitant information-sharing) cease  
once a bankruptcy is filed.

25 The court, though mindful of the Farm Entities' concern,  
26 does not agree that requiring parties with notice of a related  
27 party's imminent bankruptcy filing to remove their records in  
28 order to avoid a finding of waiver will discourage shared  
administrative arrangements. In any event, the court's findings  
as expressed in this decision are limited to the facts of this  
case.

**CERTIFICATE OF MAILING**

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

Office of the US Trustee  
501 "I" Street, Suite 7-500  
Sacramento, CA 95814

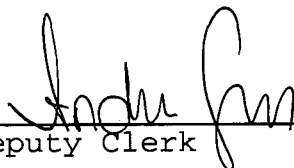
Gregory Nuti  
Schnader Harrison Segal & Lewis  
One Montgomery Street, Suite 2200  
San Francisco, CA 94104- 5501

Dale Ginter  
Downey Brand, LLP  
621 Capitol Mall, 18th Floor  
Sacramento, CA 95814-4731

Donald Putterman  
Kasowitz, Benson, Torres & Friedman  
101 California Street, Suite 2050  
San Francisco, CA 94111

Malcolm Segal  
Segal & Kirby, LLP  
770 L Street, 1440  
Sacramento, CA 95814

DATE: October 9, 2009

  
Deputy Clerk